STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2007
v	No. 269644 Monroe Circuit Court
KEVIN VAN ALFREY, Defendant-Appellant.	LC No. 05-034534-FH

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of operating a motor vehicle while intoxicated, MCL 257.625(1)(b) (alcohol content of .08 grams or more per 210 liters of breath), third offense notice, MCL 257.625(11)(c)(i) (authorizing imprisonment for not less than one year or more than five years when defendant has two or more prior convictions). Defendant was sentenced, as a third habitual offender, MCL 769.11, to 43 months to 10 years in prison. We affirm defendant's conviction, vacate the award of attorney fees contained in the judgment, and remand for further proceedings.

Defendant's conviction arises out of an automobile collision that occurred when a van, which the jury concluded defendant was driving, turned left in front of an oncoming car. The driver and the passenger of the car both testified that defendant was the driver and appeared to be intoxicated; his speech was slurred, and he was having trouble opening the door and lighting a cigarette. Defendant seemed angry and unpredictable so they left the scene to wait for the police. All three police officers who handled the accident testified that defendant was the only person at the scene and appeared to be intoxicated. One of the officers testified concerning defendant's poor performance on a sobriety test, and the parties stipulated to the admission of the results of a breath test later administered at the police station which showed defendant was well over the statutory threshold required for driving while intoxicated. Defendant's brother testified for the defense that he, not defendant, was driving the van at the time of the accident but left to find help.

Defendant's first argument on appeal is that he was denied a fair trial because the prosecutor improperly asked a defense witness to comment on the credibility of two prosecution witnesses. In the alternative, he argues that his trial attorney's failure to object to this instance of alleged misconduct constituted ineffective assistance of counsel. We disagree.

In order to preserve for appeal the issue of prosecutorial misconduct, the defendant must raise a timely and specific objection at trial. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Because defendant did not object to the prosecutor's questioning at trial, this issue is unpreserved. Because defendant failed to object to the alleged misconduct, we review for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Id.* "We will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (internal quotations omitted).

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court, *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Where the defendant fails to preserve the issue, appellate review is "limited to mistakes apparent on the record." *Id.* "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

It is improper for a prosecutor to ask a defense witness to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). In this case, defendant's brother testified that he was unimpaired, driving carefully and did not cross the centerline. The prosecutor then asked, "So if other [prosecution] witnesses . . . testified that that happened then they would be lying, is that correct?" The witness responded, "I believe so." This line of questioning was improper as "the prosecutor's strategy was to discredit [the witness] by inviting him to label prosecution witnesses 'liars.'" *Buckey*, *supra* at 17; *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988).

Nonetheless, defendant has not met his burden of showing plain error. The testimony of defendant's brother was the only evidence suggesting that someone other than defendant was driving the van. The occupants of the other vehicle testified that defendant was driving at the time of the accident and was the only person in the van. One of the police officers testified that defendant first told him his brother had been driving, but said multiple times during their conversation, "I should not have made that left turn." None of the police officers ever saw anyone besides defendant at the scene, and two of them checked the area around the van and only saw footprints in the snow on the driver's side of the van. Consequently, we do not find that defendant established his burden under *Thomas, supra*.

For the same reason, defendant has not established that he received ineffective assistance of counsel. "Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden

of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* In this case, even if defense counsel's failure to object to the prosecutor's questioning was unreasonable, for the reasons already discussed, defendant has not shown that counsel's error was prejudicial.

Both the prosecutor and defendant agree that because defendant is indigent, the trial court erred in ordering him to repay attorney fees without considering his ability to pay. Although defendant failed to object to the trial court's assessment of attorney fees at sentencing, we conclude that plain error affecting defendant's substantial rights has occurred. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

In *Dunbar*, *supra* at 254-255, this Court held that, when ordering an indigent defendant to repay his attorney's fees, a trial court

> does need to provide some indication of consideration [of the defendant's ability to pay], such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. . . . The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay . . . [A] defendant's capacity for future earnings may also be considered.

In this case, the judgment of sentence orders defendant to pay $2,028 in attorney fees and includes a 20 percent late penalty on any amount outstanding 56 days after the sentencing date. Although the presentence investigation report reflected defendant's indigence and his incarceration for over a year prior to his sentencing date, the court provided no indication that it considered defendant's ability to pay or his future earnings potential. Accordingly, we vacate the portion of the trial court's order that requires defendant to repay attorney fees and remand for reconsideration in light of *Dunbar*, *supra* at 252-256.

Defendant's next argument on appeal is that his trial counsel's failure to file a motion to suppress several statements defendant made at the scene of the accident constituted ineffective assistance of counsel. He also argues that his appellate counsel was ineffective for failing to raise this claim of ineffective assistance of trial counsel. We disagree.

When a suspect is in custody, police officers are required to give *Miranda*[1] warnings before asking questions or taking actions that are likely to draw an incriminating response from

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed2d 694 (1966).

the suspect. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002); *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). However, in this case the statements were made by defendant when the responding officer had just arrived at the scene, and was asking preliminary investigatory questions. Under these facts, no *Miranda* warning was required, *Berkemer v McCarty*, 468 US 420, 441-442; 104 S Ct 3138; 82 L Ed 2d 317 (1984), and trial counsel was not ineffective for not seeking to suppress the statement. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant also argues that his appellate attorney was ineffective for "failing to perfect the claims of ineffective assistance of trial counsel." "The test for ineffective assistance of appellate counsel is the same as that for trial counsel." *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Although defendant's appellate counsel did raise an ineffective assistance claim, he did not do so with respect to the *Miranda* issue. Regardless, "defendant's argument fails because he is unable to show any possible prejudice. Defendant himself argues that his trial counsel was ineffective; therefore the issue was presented to this Court, and appellate counsel's failure to do so was insignificant. *Id*. at 431.

We affirm defendant's conviction and sentence. We vacate the portion of the judgment that requires defendant to reimburse the county $2,028 in attorney fees and remand to the trial for a decision on attorney fees that considers defendant's current and foreseeable future ability to pay. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray